

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent and Insurance Co. of the West. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and Commerce and Industry. Steven J. Quinn, of Kansas City, Missouri appeared for respondent and Continental Western. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and TIG Insurance Company. Clinton Collier, of Overland Park, Kansas, appeared for respondent and Kansas Truckers Risk Management Group. Rex Henoch, of Overland Park, Kansas, appeared for respondent. Derek R. Chappell, of Ottawa, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). Due to a conflict, Board Member Gary R. Terrill, has recused himself from this appeal. Accordingly, Joseph Seiwert, of Wichita, Kansas, has been appointed as a Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant suffered personal injury by accident arising out of and in the course of his employment, with a date of accident on February 28, 2004, the last date claimant worked for respondent. The ALJ found claimant to be permanently and totally disabled and ordered the Kansas Workers Compensation Fund to pay for the benefits awarded as respondent was uninsured and unable to pay as of the date of the accident.

The Kansas Workers Compensation Fund, Respondent and Continental Western, and Respondent and Commerce & Industry, filed applications for review. Respondent had several insurance carriers during claimant's employment. There were also periods where respondent did not have workers compensation coverage.¹

The Fund argues that it should not be found solely responsible for the compensation due, as claimant suffered symptoms in his shoulders and was given restrictions and accommodations by his employer well before his last day of work. The Fund argues that all five insurance carriers who were on the risk for respondent as claimant was continuing to suffer injury should pay for the benefits and expenses incurred under their respective coverage period. The Fund contends that to do otherwise would be an injustice. The Fund argues it would be inequitable to allow the carriers to escape responsibility for benefits due to claimant which were incurred during their periods of coverage.

Continental Western² argues that Award should be affirmed and it should be reimbursed for the benefits it paid, pursuant to K.S.A. 44-556(e). Joint and several liability should be denied.

Commerce and Industry³ argues the that Award should be affirmed and it should be reimbursed for \$2,948.19 in temporary total disability benefits and \$220,445.83 in medical expenses that it paid. Commerce and Industry contends that no benefits were incurred

¹ The parties stipulate that respondent was uninsured during the following periods: May 2, 2000 to May 22, 2000, August 17, 2003 to October 31, 2003, December 7, 2003 to December 10, 2003 and February 20, 2004 to claimant's last day of work February 28, 2004.

² Covered Respondent from November 15, 2002 to August 16, 2003, November 1, 2003 to December 6, 2003 and December 11, 2003 to February 19, 2004.

³ Covered Respondent from May 23, 2002 to November 15, 2002.

during its coverage period, and that claimant's date of injury did not occur during its brief coverage period.

Kansas Truckers Risk Management Group⁴ argues that the greater weight of the evidence establishes claimant's date of accident was after December 31, 1998, which is after its dates of coverage, therefore it is not liable for any payment of benefits.

Insurance Co. of the West⁵ argues that the Award should be affirmed and it should be reimbursed for the \$2,948.19 in temporary total disability benefits and \$223,948.64 in medical expenses that it paid. Insurance Co. of the West contends that no benefits were incurred during its coverage period, and that claimant's date of injury did not occur during its brief coverage period.

Respondent denies that claimant suffered accidental injury on the alleged dates, and that any such alleged accidental injury, regardless of the date, did not arise out of and in the course of claimant's employment. However, respondent contends that if claimant suffered the alleged accident and resulting injuries/medical conditions, then those events occurred during a period of time when respondent had insurance coverage. Respondent contends that date of accident is before claimant's last day work and while it was properly insured. Respondent believes that all of the carriers should be held jointly and severally liable for benefits.

Claimant argues that K.S.A. 44-510k is inapplicable to this claim as medical is a substantive right subject to ex-post facto laws, in other words, the law at the time of the accident is the law that governs. Therefore, claimant contends that the Award should be modified to find that "claimant is entitled to future medical care upon application as said law existed prior to May 15, 2011, when K.S.A. 44-510K was enacted".

THE ISSUES ARE:

1. What is claimant's date of accident?
2. Are the Fund, respondent, and/or the various insurance carriers responsible for all or part of the award entered, and if so, who is responsible, for which periods and for how much?
3. Are the insurance carriers entitled to reimbursement for benefits paid to claimant in light of the ALJ's finding that respondent was not insured on the date of the accident,

⁴ Covered Respondent from January 1, 1998 to December 31, 1998.

⁵ Covered Respondent from May 1, 1999 to May 1, 2000 and May 23, 2000 to May 23, 2002.

resulting in assessment of the liability against the Fund? If so, what entity or entities are liable for such reimbursement?

FINDINGS OF FACT

Claimant was an over-the-road truck driver who worked for respondent from 1982 to 1986 and then again from 1992 until February 2004. His last date of work for respondent was February 28, 2004. Claimant developed pain in both shoulders in 1998. He claimed a series of accidents “[f]rom on or about June 29, 1998 and each and every day worked thereafter.”⁶ Claimant was diagnosed with degenerative arthritis in his shoulders in 1999 and was treated conservatively by Dr. Mark Maguire. He continued to work for respondent. However, for several years, claimant was required to self-medicate, using Ibuprofen. Claimant began taking Ibuprofen in 2001. Claimant testified that he was prescribed 800 mgs and he took as many as he needed each day to stop the pain.⁷ As claimant continued to drive, his shoulder condition continued to worsen. Claimant admitted that no physician ever gave him restrictions or indicated he should stop working because of his injuries.⁸

Claimant was later diagnosed with kidney failure caused by his overuse of Ibuprofen. He underwent a period of dialysis and then received a kidney transplant.⁹

During the period of time from 1998, respondent was insured by several workers compensation carriers, with some gaps in coverage:

Apr. 1, 1997 to Apr. 1, 1998	Kansas Manufacturers & Commerce SI Fund
Jan. 1, 1998 to Dec. 31, 1998	Kansas Truckers Risk Management Group
Jan. 1, 1999 to May 23, 1999	TIG Insurance Company (TIG)
May 23, 1999 to May 23, 2002	Ins. Co. of the West
May 23, 2002 to Nov. 15, 2002	Commerce & Industry
Nov. 15, 2002 to Aug. 16, 2003	Continental Western
Aug. 17, 2003 to Oct. 31, 2003	Uninsured
Nov. 1, 2003 to Dec. 6, 2003	Continental Western
Dec. 7, 2003 to Dec. 10, 2003	Uninsured
Dec. 11, 2003 to Feb. 19, 2004	Continental Western

⁶ Form K-WC E-1 Amended Application for Hearing, filed Feb. 28, 2003.

⁷ R.H. Trans. (July 26, 2011) at 54.

⁸ Claimant's Depo. (Apr. 28, 2005) at 54-55.

⁹ During oral argument, the parties indicated that claimant is now deceased, although the time and cause of claimant's death was not clarified.

Feb. 20, 2004 to Feb. 28, 2004 Unknown¹⁰

At the first preliminary hearing on June 5, 2003, it was agreed that Dr. Craig Satterlee was a suitable specialist to examine and treat claimant. The ALJ determined that respondent and its four named insurance carriers should pay for claimant's treatment "at their mutual expense for the time being" ¹¹ That order was appealed to the Board. The Board dismissed the appeal, finding that it did not have jurisdiction to review a preliminary hearing addressing the liability among multiple insurance carriers. ¹²

A second preliminary hearing was held December 9, 2004. After that hearing, the ALJ ordered that claimant's "current medical treatment for his temporary needs be continued by the employer and the involved carriers until a final hearing can be held" ¹³ Respondent and two of its insurance carriers, TIG and Ins. Co. of the West, appealed the ALJ's Preliminary Decision to the Board. The issues set out in that appeal were whether the ALJ erred in including TIG and Ins. Co. of the West as being responsible for claimant's medical treatment, whether claimant's shoulder condition was a result of his employment with respondent, and whether the problem with claimant's kidneys was a result of a work-related injury. The Board held that claimant's shoulder problems and resulting kidney difficulties were caused by his years of working as an over-the-road truck driver. The Board also found that "the ALJ did not exceed his jurisdiction in ordering the cost of claimant's ongoing treatment to be shared among the various insurance carriers until the time of final award." ¹⁴

On May 9, 2005, claimant filed a Notice of Impleading the Workers Compensation Fund, alleging that the respondent was uninsured on the date of accident relevant in this case and is or may be financially unable to pay the compensation that could be awarded in the matter. Thereafter, respondent/Continental Western filed an Application for Preliminary Hearing requesting a finding as to which entity would be responsible for the payment of workers compensation benefits to claimant. A hearing on that Application was held November 30, 2006, and appearances were made by counsel for claimant, respondent, the Fund, and insurance carriers Continental, West Group, and Commerce. No appearance was made on behalf of respondent/TIG.

¹⁰ The Division's records show Lumbermen's Underwriting as the insurance carrier from December 31, 2003, to December 31, 2004. However, as noted above, the parties have stipulated that claimant was uninsured during a portion of this period through claimant's last day worked with respondent.

¹¹ ALJ Preliminary Decision (June 9, 2003) at 1.

¹² Board Order, No. 268,622, 2003 WL 22401264 (Kan. WCAB Sept. 16, 2003).

¹³ ALJ Preliminary Decision (Dec. 16, 2004) at 2.

¹⁴ Board Order, No. 268,622, 2005 WL 831899 (Kan. WCAB Mar. 28, 2005).

There was no testimony taken at the hearing held November 30, 2006. At that hearing, counsel for respondent/Continental Western requested that the ALJ determine which of the carriers was to be liable for the costs of the workers compensation benefits. It appeared that although all carriers had been ordered to make payments "at their mutual expense,"¹⁵ at least one of the carriers (TIG) had failed and refused to make any payments. Claimant's attorney indicated that, as a result of one carrier refusing to pay, none of the carriers were then complying with the order to provide medical treatment, although temporary total benefits were still being paid.

Counsel for respondent (uninsured) argued that there was no jurisdiction that would allow a preliminary hearing for the sole purpose of apportioning liability among carriers.

The ALJ was asked to make a ruling as to the last day claimant worked in order to pinpoint the insurance carrier that would be liable for the claim. The only testimony in the record concerning claimant's last day of work was in claimant's discovery deposition taken April 28, 2005, when he said he thought his last day of work was February 28, 2004. Counsel for respondent (uninsured) indicated that it was his understanding that the last day claimant was on the payroll was February 25, 2004, and that there was a question whether claimant, in fact, worked anytime after February 19, 2004, the last day Continental Western had coverage for respondent. Although he was not under oath, a representative of respondent told the ALJ that the only way to establish claimant's last day worked would be through his driver log. However, he said respondent is only required to keep those logs for six months, and the claimant's logs are no longer available. Counsel for respondent/Continental Western also questioned whether claimant was accommodated during a period of coverage for one of respondent's previous carriers.

Claimant was not present at the November 30, 2006, preliminary hearing. Counsel for respondent/Continental Western offered the April 28, 2005, discovery deposition of claimant to be considered as part of the record. Both counsel for respondent (uninsured) and counsel for the Fund objected, indicating they had not been involved in taking that deposition. The ALJ overruled the objections and allowed the discovery deposition testimony of claimant to be included as part of the record.¹⁶ Respondent was provided notice of the discovery deposition and although its present counsel was not representing respondent at the time, notice and opportunity to be heard was provided to respondent. The Fund was not then a party to this claim. Nevertheless, neither counsel for respondent (uninsured) nor counsel for the Fund requested an opportunity to depose claimant or for the record to be held open to allow the taking of other testimony or to present additional evidence.

¹⁵ ALJ Preliminary Decision (June 9, 2003) at 1.

¹⁶ The ALJ made a reference at page 17 of the November 30, 2006, preliminary hearing transcript to an Exhibit 1, but there is no such exhibit listed or attached to the hearing transcript.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁸

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁹

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.²⁰

The date of accident in a situation where a claimant suffers many small injuries over a long period of employment has long been a source of confusion in workers compensation litigation. The courts struggled for years trying to determine the best result with that difficult issue. The Kansas appellate courts ultimately established a bright line rule for identifying the date of injury in a repetitive, micro-trauma situation. That date of injury was found to be the last day worked, regardless of whether the claimant was forced to terminate his or her employment as a result of the injuries sustained,²¹ or was just moved to an accommodated position.²² The court applied the *Berry* rule, determining that the last day worked is the claimant's last day on the job that caused the injuries.

¹⁷ K.S.A. 44-501 and K.S.A. 44-508(g).

¹⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁹ K.S.A. 44-501(a).

²⁰ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

²¹ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 p.3d 947 (2000); *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 960 P.2d 768 (1998); *Berry v. Boeing Military Airplanes*, Kan. App. 2d 220, 885 P.2d 1261 (1994).

²² *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

Here, claimant has testified that his last day worked was February 28, 2004, the date adopted by the ALJ in the Award. It was argued that claimant last worked on February 25, 2004, or even February 19, 2004. But, no exact date has been proven by any insurance carrier to contradict the specific testimony of claimant. The Board finds that, pursuant to *Berry* and the long line of cases following, that claimant's date of accident is the last day worked, that being February 28, 2004. As noted above, respondent was not insured on that date. Therefore, the assessment of any permanent disability against the Fund would be appropriate.

It was also determined by the ALJ that claimant is permanently and totally disabled as the result of the injuries to his shoulders and the resulting disabling condition with his kidneys. That finding was not appealed to the Board. K.S.A. 2000 Furse 44-510f(a)(1) limits the total award when dealing with a permanent total disability situation to \$125,000.00. At the July 26, 2011 regular hearing, the parties stipulated to Joint Exhibit A listing the totals of temporary total disability (TTD) and medical treatment paid by the various insurance companies and the Fund. The total TTD paid was listed at \$130,677.63, well over the \$125,000.00 statutory limit.

K.S.A. 2000 Furse 44-534a(b) states:

(b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

K.S.A. 2003 Supp. 44-556(e) states:

(e) If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer, the employer's insurance carrier or the workers compensation fund during the pendency of review under this section, and pursuant to K.S.A. 44-534a or K.S.A.

44-551, and amendments thereto, and the employer, the employer's insurance carrier or the workers compensation fund, which was held liable for and ordered to pay all or part of the amount of compensation awarded by the administrative law judge or board, is held not liable by the final decision on review by either the board or an appellate court for the compensation paid or is held liable on such appeal or review to pay an amount of compensation which is less than the amount paid pursuant to the award, then the employer, employer's insurance carrier or workers compensation fund shall be reimbursed by the party or parties which were held liable on such review to pay the amount of compensation to the worker that was erroneously ordered paid. The director shall determine the amount of compensation which is to be reimbursed to each party under this subsection, if any, in accordance with the final decision on the appeal or review and shall certify each such amount to be reimbursed to the party required to pay the amount or amounts of such reimbursement. Upon receipt of such certification, the party required to make the reimbursement shall pay the amount or amounts required to be paid in accordance with such certification. No worker shall be required to make reimbursement under this subsection or subsection (d).

Normally, under K.S.A. 2000 Furse 44-534a, and K.S.A. 2003 Supp. 44-556, if a respondent or insurance company pays above its actual liability limit, reimbursement from the Fund or another insurance company under K.S.A. 2003 Supp. 44-532a or K.S.A. 2003 Supp. 44-556(e) would be appropriate. However, in this instance, of the total TTD paid, the Fund paid \$77,245.08. Therefore, there would not appear to be any amounts due and owing to either Commerce and Industry, or Continental Western, the only insurance companies shown to have paid TTD other than the Fund. Joint Exhibit A to the regular hearing lists the amounts of TTD paid, but not the dates on which it was incurred or paid.

Whether either insurance company paid TTD outside of its coverage date cannot be determined from this record.

Likewise, Joint Exhibit A to the regular hearing lists the amount of medical benefits paid by several of the insurance companies and the Fund. Several insurance companies claim a right to reimbursement for medical benefits paid. Under both K.S.A. 2000 Furse 44-534a and K.S.A. 2003 Supp. 44-556(e) a right to reimbursement from the Fund or from another insurance company may exist. But, just as with the TTD, while the record shows the amounts of medical benefits paid, it fails to indicate the dates on which the medical liabilities were created and the dates on which the medical bills were paid.

The Board finds that each insurance carrier is liable for those medical expenses incurred and weeks of TTD compensation that accrued during each such insurance carrier's period of coverage. Likewise, respondent and the Fund are liable for TTD compensation and medical expenses incurred while respondent was uninsured and all such benefits incurred after February 28, 2004. Under K.S.A. 2003 Supp. 44-556(e) there is an entitlement to reimbursement for monies paid which are later found to be the responsibility of another. But, without specific dates of liability and payment, no such findings can be made herein. This matter is remanded to the ALJ for determination of the

amount of TTD and medical benefits to be reimbursed by the various insurance companies to each other and/or by the Fund to the insurance companies. The insurance companies are instructed to provide the ALJ with the dates of liability and dates of payment, for both TTD and medical compensation, pursuant to K.S.A. 2000 Furse 44-534a and K.S.A. 2003 Supp. 44-556(e).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the date of accident, but remanded to the ALJ for a determination as to what if any reimbursement may be due to the various insurance companies for both TTD and medical compensation paid.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates dated February 27, 2012, is affirmed with regard to the date of accident on February 28, 2004. The matter will be remanded to the ALJ for a determination under K.S.A. 2003 Supp. 44-556(e) as to the amounts of reimbursement for both TTD and medical compensation which may be due from the Fund and from or to the various insurance companies involved in this litigation.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

BOARD MEMBER

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